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OLD BEN COAL CO.

2 IBSMA 38

Decided *April 3, 1980*

Petition for discretionary review by Old Ben Coal Co. from a Nov. 5, 1979, decision by Administrative Law Judge William J. Truswell sustaining a notice of violation and resulting civil penalty assessment issued for violation of the effluent limitations for suspended solids in 30 CFR 715.17(a) (Docket No. IN 9–15–P).

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Specificity

The failure of an OSM inspector to set forth with reasonable specificity in a notice of violation the nature of the alleged violation and the required remedial action will result in a vacation of the notice.

APPEARANCES: Robert J. Araujo, Esq., Chicago, Illinois, for Old Ben Coal Co.; Frank J. Ruswick, Jr., Esq., Mark Squillace, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

On Feb. 21, 1979, pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act),[1] inspectors from the Office of Surface Mining Reclamation and Enforcement (OSM) inspected a surface mine in Pike County, Indiana, operated by Old Ben Coal Co. (Old Ben). During that inspection[2] a sample was taken of water flowing from a sedimentation pond, located several hundred feet off the permit area (Tr. 81), into a stream 180 feet below the pond (Tr. 15). The sample was taken at the point the discharge entered the stream (Tr. 13). Laboratory analysis of the sample showed 900 milligrams per liter of suspended solids (Tr. 13), an amount in excess of the limitations imposed by 30 CFR 715.17(a). On Feb. 26, 1979, OSM issued to Old Ben Notice of Violation No. 79–III–12–2 for violation of 30 CFR 715.17(a).[3] On Mar. 21, 1979, OSM issued a proposed civil penalty assessment of $2,500 based on that notice.

Old Ben requested an assessment conference on the proposed civil penalty which was held on May 20, 1979. As a result of that conference, OSM lowered the proposed penalty to $1,000. On June 11, 1979, Old Ben filed a petition for review of the

[1] 30 USC §§ 1201–1328 (Supp. I 1977).

[2] As a result of the inspection, OSM also issued to Old Ben Notice of Violation No. 79–III–12–1 for an alleged violation of 30 CFR 715.16(a) and assessed a civil penalty for that violation. This violation was resolved by stipulation between the parties and is not before the Board.

[3] OSM did not cite Old Ben for mining off the permit area in violation of 30 CFR 710.11(a)(2) and sec. 502(a) of the Act (30 U.S.C. § 1252(a) (Supp. I 1977)) or for failure to pass all surface drainage from the disturbed area through a sedimentation pond or series of sedimentation ponds before leaving the permit area in violation of 30 CFR 715.17(a).

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assessment. A hearing was held before Administrative Law Judge William J. Truswell on Aug. 10, 1979. His Nov. 5, 1979, decision sustained both the violation and the penalty assessment.

Old Ben petitioned the Board for discretionary review of this decision on Nov. 19, 1979. The Board granted the petition on Nov. 29, 1979, and timely briefs were filed by both parties.

Discussion and Conclusions

OSM charged Old Ben with a violation of 30 CFR 715.17(a). That regulation reads in pertinent part:

> All surface drainage from the disturbed area, * * * shall be passed through a sedimentation pond or a series of sedimentation ponds before leaving the permit area. * * * Discharges from areas disturbed by surface coal mining and reclamation operations must meet all applicable Federal and State laws and regulations and, at a minimum, the following numerical effluent limitation: * * * [total suspended solids—70.0 milligrams per liter].

From the record it appears that OSM was concerned only about the high levels of suspended solids picked up by the discharge after it left the sedimentation pond. As noted by both Old Ben [4] and OSM,[5] this concern appears to be addressed by 30 CFR 715.17(f), which states: "Discharges from sedimentation ponds and diversions shall be controlled, where necessary, using energy dissipators, surge ponds, and other devices to reduce erosion and prevent deepening or enlargement of stream channels and to minimize disturbances to the hydrologic balance." As Old Ben indicated at the hearing and to the Board, the notice of violation it received did not refer to 30 CFR 715.17(f) either by explicit reference or by description of the alleged violation.[6]

[1] OSM urges the Board to hold that 30 CFR 715.17(a) incorporates 30 CFR 715.17(f) by reference and that, through this incorporation, discharges are subject to the specific effluent limitations of sec. 715.17(a) until they reach a point of ultimate dispersion into the natural environment. We cannot agree. The language upon which OSM bases its incorporation-by-reference argument [7] refers to disturbed areas, and the parties have stipulated that the effluent limitations of sec. 715.17(a) were met by the water flowing from the sedimentation pond.[8] The notice of violation, however, only alleges a violation of 30 CFR 715.17(a) and explains that violation as: "Discharge from affected area fails to

[4] Petitioner's Br. 10–11.
[5] Respondent's Br. 5–6.

[6] The notice stated:
"Nature of Violation(s): Discharge from affected area fails to meet effluent limitations.
"Provision * * * Violated: 30 CFR 715.17 (a).
"Portion * * * to which Notice Applies: All discharge thru sed. pond next to erection site hill.
"Remedial Action Required: Take appropriate action to limit the discharge of suspended soils [*sic*] and iron so that the effluent limitations are met."

[7] OSM relies on the language of 30 CFR 715.17(a) that says: "Discharges from areas disturbed by surface coal mining and reclamation operations must meet all applicable Federal and State laws and regulations * * *."

[8] Tr. at 74.

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meet effluent limitations." There is no clear indication in the notice that OSM was concerned about the effects of the discharge after it left the sedimentation pond; yet that is the nature of the violation sought to be shown at the hearing. We are unable to hold that this notice "set[s] forth with reasonable specificity the nature of the violation and the remedial action required" as mandated by sec. 521(a)(5) of the Act.[9]

The Nov. 5, 1979, decision of the Administrative Law Judge is therefore reversed and Notice of Violation No. 79-III-12-2 and the resulting civil penalty assessment are vacated.

WILL A. IRWIN
Chief Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

APPEAL OF SLATER ELECTRIC CO. OF CALIFORNIA

IBCA-1283-7-79

Decided *April 7, 1980*

Contract No. 6/07/DC/72080, Central Arizona Project.

Sustained.

1. Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Conflicting Clauses—Contracts: Construction and Operation: Construction Against Drafter

Where the Government modified an invitation for bids by adding a note regarding grouting of equipment to two drawings but failed to change the drawings of circuit breakers to show placement of the grout and failed to change the specifications to require grouting of the circuit breakers, the Board held, under the rule of *contra proferentem* that the contractor's interpretation that the contract did not require grouting of the circuit breakers was reasonable and should prevail. The Government's direction to grout 17 of 21 Government-furnished circuit breakers was a change which entitled the contractor to an equitable adjustment.

APPEARANCES: Thomas W. Eres, Attorney at Law, Kronick, Moskovitz, Tiedman & Girard, Sacramento, California, for Appellant; William A. Perry, Department Counsel, Denver, Colorado, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PACKWOOD

INTERIOR BOARD OF CONTRACT APPEALS

This is a timely appeal from the contracting officer's denial of a claim for additional compensation for costs incurred in grouting 17 circuit breakers at the Davis and Parker Switchyards, Central Arizona Project. Neither party elected a hearing and the appeal is submitted on the record.

Findings of Fact

Contract No. 6/07/DC/72080 was awarded to the Slater Electric Co. of California on Aug. 18, 1976, for construction and completion of the Davis Parker Switchyards for

[9] 30 U.S.C. § 1271(a)(5) (Supp. I 1977).

the Central Arizona Project, under Specification No. DC–7208 (Appeal File Exh. 1).

The contract called for Slater to install 21 Government-furnished circuit breakers. Four circuit breakers were installed on concrete foundations without grouting. Slater notified the Government that both of the supporting I-beams on a fifth circuit breaker were not fabricated properly and that severe tilting of the I-beams affected the full and even bearing on the concrete foundation (Appeal File Exh. 4).

The Government directed Slater to grout the defective support beams in order to achieve full and even bearing. Further, the Government required grouting of the remaining 16 circuit breakers (Appeal File Exh. 5). There is no evidence of record to show whether there were any defects in the supporting beams of these 16 circuit breakers or whether full and even bearing on the foundations could have been achieved without grouting.

Slater timely notified the Government that its cost for grouting each of the circuit breakers was $531.50. The contracting officer denied Slater's claim for additional compensation for grouting. In denying the claim, the contracting officer relied on Drawing Nos. 391–D–1332 and 231–D–2780A, each of which contained the following note: "Equipment installed on concrete foundations shall be given full and even bearing by being grouted in place as directed."

The note appeared for the first time on revised versions of the drawings furnished with supplement No. 2 to the invitation for bids. Previous versions of the drawings furnished with supplement No. 1 and with the original invitation did not contain such notes. The contracting officer conceded that nothing else in the drawings or specifications referred to grouting the circuit breakers. He relied on clause No. 2 of the General Provisions, Specifications and Drawings, which provides: "Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both."

Pursuant to the above clause, the contracting officer determined that it was not necessary for the grouting requirement to be in both the specifications and the drawings in order to be a contract requirement.

Slater, on the other hand, interpreted the notes as applying only to those installations of equipment where a layer of grout was shown on the drawings or set forth in the text of the specifications.

Decision

[1] When the notes regarding grouting were added to the two drawings, there was no accompanying change in the drawings of the circuit breakers to show the addition of a layer of grout between the supporting beams and the concrete foundations and no change in the specifications. If the Government had truly intended to impose a new

requirement for grouting circuit breakers at a potential additional cost of more than $11,000, it does not appear reasonable that it would have done so in such a casual manner.

The Government's reliance on clause No. 2 of the General Provisions rests on its belief that the requirement was shown on the drawings. Slater regarded the notes as "boilerplate" and, in the absence of any other mention in the specifications or showing in the drawings, concluded that the notes applied only to equipment which had a grouting requirement spelled out or shown somewhere else in the contract. Under the rule of *contra proferentem*,[1] we find that Slater's interpretation is reasonable and is entitled to prevail.

Consequently, the Government's direction to grout 17 circuit breakers was a change for which Slater is entitled to an equitable adjustment. The Government has offered no evidence to show that Slater's costs of $531.50 per circuit breaker for grouting are unreasonable. The Board finds that Slater is entitled to an equitable adjustment of $9,035.50 (17 × $531.50).

G. HERBERT PACKWOOD
Administrative Judge

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

[1] *Commonwealth Electric Co.*, IBCA-1048-11-74 (Sept. 30, 1977), 84 I.D. 867, 77-2 BCA par. 12,781.

APPEAL OF TANACROSS, INC.

4 ANCAB 173

Decided *April 7, 1980*

Appeal from decision of Bureau of Land Management (BLM) F-14943-B.

Affirmed.

1. Alaska Native Claims Settlement Act: Definitions: Withdrawal for National Defense Purposes

The phrase "national defense purposes" is not a term of art and does not have a precise legal meaning, but is a broadly inclusive descriptive term.

2. Alaska Native Claims Settlement Act: Definitions: Withdrawal for National Defense Purposes

Where neither the express language, nor the legislative history of ANCSA draws any distinction between withdrawals "for national defense purposes" and withdrawals for military reservations or other military uses, a withdrawal for use of the Department of the Army for terminal facilities in connection with a petroleum products pipeline system is considered to be a withdrawal "for national defense purposes" within the meaning of § 11(a)(1) of ANCSA.

3. Alaska Native Claims Settlement Act: Definitions: Withdrawal for National Defense Purposes—Withdrawals and Reservations: Revocation and Restoration

In determining whether a national defense withdrawal, within the meaning of § 11(a)(1) of ANCSA, existed on Dec. 18, 1971, only the formal legal status of the withdrawal may be considered, and it is immaterial whether the purpose of the withdrawal has been fulfilled or whether the actual use to which the land is put has changed.

4. Alaska Native Claims Settlement Act: Definitions: Withdrawal for National Defense Purposes

ANCSA does not give the Secretary of the Interior the authority to make factual determinations as to the actual use of land which is withdrawn for national defense purposes, resulting in removal of such land from the protection of the exception for national defense purpose withdrawals in § 11(a)(1) of ANCSA.

5. Withdrawals and Reservations: Revocation and Restoration

The Army's filing of a notice of intent to relinquish certain property cannot revoke a national defense withdrawal because the Army lacks the authority to revoke such withdrawals.

6. Withdrawals and Reservations: Revocation and Restoration

A notice of intent to relinquish property is not a relinquishment but a method by which an agency of the Federal Government expresses the intention to relinquish the property at a future time, upon completion of required statutory and regulatory procedures.

7. Withdrawals and Reservations: Revocation and Restoration

The issue of whether ANCSA supercedes certain provisions of the Federal Property and Administrative Services Act, as regards administrative actions taken concerning a specific withdrawal, is rendered moot by a finding that the withdrawn lands were never available for selection under ANCSA. When a notice of intention to relinquish affects lands not withdrawn pursuant to ANCSA, BLM is required to follow the provisions of the Federal Property and Administrative Services Act, and the regulations promulgated under that Act.

8. Applications and Entries: Generally

Having determined that the lands in question were withdrawn for national defense purposes during the selection period, BLM was required to reject appellant's selection application for such lands pursuant to regulations in 43 CFR 2091.1.

APPEARANCES: Douglas Paul Elliott, Esq., Goldberg & Elliott, and James B. Gottstein, Esq., Goldberg, Breckberg & Gottstein, for appellant; Bruce E. Schultheis, Esq., and M. Francis Neville, Esq., Office of the Regional Solicitor, Alaska, U.S. Department of the Interior, for the Bureau of Land Management.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

SUMMARY OF APPEAL

Tanacross, Inc. appeals BLM's rejection of their selection of lands within a withdrawal, for the Department of the Army, for terminal facilities which are part of the Haines-Fairbanks petroleum pipeline system. BLM's grounds for rejection were that the lands were withdrawn for national defense purposes and, under § 11(a)(1) of ANCSA, were therefore not withdrawn for Native selection and could not be selected by Tanacross.

Tanacross contends that the lands, although withdrawn for a military use, were not withdrawn "for national defense purposes" within the meaning of the exception in § 11(a)(1); furthermore, even if the withdrawal was originally for national defense purposes, it had been changed in character before the end of the selection period by acts of relinquishment on the part

of the Army and the withdrawn lands should, therefore, have been made available for selection by Tanacross.

The Board finds that (1) the lands in question were withdrawn for national defense purposes within the meaning of the exception in § 11(a)(1); (2) the lands remained withdrawn for national defense purposes at all relevant times through the end of the selection period and therefore were not withdrawn for Native selection; and (3) BLM did not violate applicable statutes and regulations in its handling and rejection of this portion of the Tanacross selection.

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601–1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

PROCEDURAL BACKGROUND

On Dec. 9, 1974, Tanacross, Inc. (Tanacross) filed selection application F–14943–B pursuant to § 12(a) of the Alaska Native Claims Settlement Act (ANCSA) (85 Stat. 688, 701; 43 U.S.C. §§ 1601–1627 (1976)). On Dec. 18, 1974, the application was amended to include "all lands within PLO 1887," in T. 18 N., Rs. 11 and 12 E., Copper River meridian.

On June 13, 1978, BLM rejected Tanacross selection application with respect to Tok Pumping Station No. 3 (also referred to as Tok terminal facilities) on the basis that those lands were withdrawn for national defense purposes and as such could not be selected under ANCSA.

On July 17, 1978, Tanacross filed its Notice of Appeal with the Alaska Native Claims Appeal Board (Board) in accordance with the regulations found in 43 CFR 4.900–4.913 (1979). This notice was followed on Nov. 13, 1978, by a Statement of Reasons and a Memorandum in Support of its Statement of Reasons.

On Dec. 20, 1978, the Board issued an order naming the General Services Administration (GSA) as a necessary party to this appeal and giving that agency 30 days within which to respond to briefings filed by the parties. The GSA has never responded to the Board's order.

The Board, on June 15, 1979, issued an order directing oral argument and simultaneous briefing of the issues. BLM filed its brief in response to this order on July 18, 1979, Tanacross filed its response on July 20, 1979. The Board heard oral argument on July 24, 1979.

Briefing was concluded and the record was closed when BLM filed its Supplemental Brief on Sept. 11, 1979, and Tanacross submitted its Reply Brief on Sept. 21, 1979.

FACTUAL BACKGROUND

The record indicates that the following events have taken place:

The United States and Canada entered into an agreement on June 30, 1953 (4 U.S.T. 2223 (1953); T.I.A.S. No. 2875), (U.S.-Canada Agreement), which authorized the construction of an oil pipeline system from Haines to Fairbanks, Alaska, passing through northwestern British Columbia and Yukon Territory. The purpose of the agreement was to maintain the pipeline system until such time as the permanent Joint Board on Defense decided that there was no further need for the system. (This decision was finally made by the Joint Board on Defense in October of 1978.)

On June 26, 1959, Public Land Order (PLO) 1887 (Fairbanks 014031) withdrew 202.35 acres of land in the Tanacross area for use by the Department of the Army for the Tok terminal facilities used in connection with the Haines-Fairbanks Products Pipeline System, as authorized by the Act of Sept. 28, 1951 (65 Stat. 336). The Tok terminal facilities consist of 20 buildings, water and fuel storage tanks, utility systems, truck loading facilities, roads, fences, dykes and dams, and vehicle parking areas.

With the enactment of ANCSA on Dec. 18, 1971, certain public lands were withdrawn in Alaska for selection by Native village corporations established under the Act. Sec. 11(a)(1) provides:

> *The following public lands are withdrawn*, subject to valid existing rights, from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from selection under the Alaska Statehood Act, as amended:
>
> (A) The lands in each township that encloses all or part of any Native village identified pursuant to subsection (b);
>
> (B) The lands in each township that is contiguous to or corners on the township that encloses all or part of such Native village; and
>
> (C) The lands in each township that is contiguous to or corners on a township containing lands withdrawn by paragraph (B) of this subsection.
>
> *The following lands are excepted from such withdrawal:* lands in the National Park System and *lands withdrawn or reserved for national defense purposes* other than Naval Petroleum Reserve Numbered 4. [Italics added.]

The relevant definition of "public lands" is contained in § 3(e):

> "Public lands" means all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installations.

Sec. 12(a)(1) places a limit on the time within which the village corporations could make their selection applications and designates the lands from which selections could be made.

> *During a period of three years from the date of enactment of this Act, the Village Corporation* for each Native village identified pursuant to section 11 *shall select*, in accordance with rules established by the Secretary, all of the township or townships in which any part of the village is located, plus an area that will make the total selection equal to the acreage to which the village is entitled under section

14. *The selection shall be made from lands withdrawn by subsection 11(a).* [Italics added.]

In May of 1970, the Department of the Army determined that the pipeline system was no longer needed.

On June 17, 1971, the Assistant Secretary for the Department of Defense made the decision to declare the pipeline system excess.

The House Armed Services Committee approved this decision on Mar. 13, 1973.

On June 7, 1973, the Army through the Real Estate Division of the Alaska District, Corps of Engineers, filed a Preliminary Report of Excess concerning disposal of the system.

In August of 1973, the Army filed with BLM a notice of intention to relinquish the military withdrawal here in question.

On Feb. 14, 1974, the Department of the Interior and the General Services Administration entered into an agreement (hereinafter DOI/GSA Agreement). This agreement established procedures for processing certain categories of property in Alaska for possible selection under ANCSA, including real property determined surplus to all Federal agency needs, withdrawn public domain lands for which the holding agency has filed a notice of intention to relinquish, and real property reported to GSA as excess by the holding agency.

On Sept. 24, 1974, a Restoration and Revocation report was issued by BLM which concluded that because of the improvements on the property it was unsuitable for return to the public domain. On the basis of this Restoration and Revocation report, BLM authorized the Army to report the property to GSA as excess on Nov. 12, 1974, and on Nov. 21, 1974, the Army sent GSA its final report of excess.

On Dec. 18, 1974, the deadline under ANCSA § 12(a)(1) for filing of village selections, Tanacross amended its selection application to include the lands withdrawn by PLO 1887.

On Mar. 23, 1976, BLM wrote to GSA informing GSA that because of the selection by Tanacross, the property should be transferred to BLM for conveyance to the village corporation. An Apr. 15, 1976, GSA responded that the Tok terminal was not available for Native selection because the property was to remain in Federal ownership.

On June 13, 1978, the BLM issued its decision rejecting the selection of the lands in question stating that "as of December 18, 1974, * * * the lands at Tok Pumping Station No. 3 remained withdrawn for the military and were therefore unavailable for selection."

DECISION

This appeal raises three questions of law: First, were the lands in question "public lands" withdrawn for village selection pursuant to § 11(a)(1) on Dec. 18, 1971, or were they "lands withdrawn or reserved for national defense pur-

poses" and thus excluded from such withdrawal? Second, if the lands were not withdrawn for village selection on Dec. 18, 1971, did anything legally transpire in the subsequent three years to make the land available for village selection? Third, did BLM follow the appropriate statutes, rules and regulations and other procedures in administering the lands withdrawn by PLO 1887?

The Board has reviewed and considered the facts and legal contentions of the parties which comprise the record in this appeal, and finds that: (1) the lands withdrawn by PLO 1887 on June 26, 1959, were withdrawn for national defense purposes within the meaning of § 11(a)(1) of ANCSA; and (2) the lands in question were still withdrawn for national defense purposes on Dec. 18, 1971, and therefore they were not withdrawn for Native village selection under § 11(a)(1) of ANCSA; further, nothing occurred between Dec. 18, 1971, and the deadline for the filing of village selection applications (Dec. 18, 1974) which legally or factually altered the national defense status of the lands withdrawn by PLO 1887, and as a result those lands were not subject to village selection. As to the third issue, BLM did not violate applicable statutes, regulations and agreements, thereby unlawfully denying appellant its selection rights under § 11(a)(1) of ANCSA, and therefore, because the lands withdrawn by PLO 1887 were not available for village selection on the deadline for filing an application for such selections, BLM could have taken no course of action but to reject the application. On the basis of these findings, the Board hereby affirms BLM's decision of June 13, 1978.

Withdrawal for National Defense Purposes

Sec. 11(a)(1) of ANCSA withdrew certain public lands surrounding a Native village for selection and eventual ownership by the village. Excepted from such withdrawal are "lands withdrawn or reserved for national defense purposes." Within the area to have been selected by appellant under § 11(a)(1) were 202.35 acres of land which had been reserved by PLO 1887 on June 26, 1959, "for use of the Department of the Army for terminal facilities used in connection with the Haines-Fairbanks Products Pipeline System, as authorized by the act of September 28, 1951 (65 Stat. 336)."

It must first be determined whether PLO 1887, in 1959, created a withdrawal or reservation for national defense purposes within the meaning of the exception above. A finding that no such withdrawal was in fact created would be dispositive of this appeal.

Referring to the express language of PLO 1887, appellant asserts that nowhere does such language indicate that the land was "withdrawn or reserved for national defense purposes." PLO 1887 reads, in pertinent part:

1. Subject to valid existing rights, the following described public lands in Alaska are hereby withdrawn from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, but not disposals of materials under the Act of July 31, 1947 (61 Stat. 681; 30 U.S.C. 601–604), as amended, and *reserved for use of the Department of the Army* for terminal facilities in connection with the Haines-Fairbanks Products Pipeline System, as authorized by the act of September 28, 1951 (65 Stat. 336). [Italics added.]

Taking the contrary position, BLM asserts that a reservation "for use of the Department of the Army" is a military withdrawal and Congress in ANCSA did not distinguish between "military" and "national defense" withdrawals. As additional support for its contention that PLO 1887 was a withdrawal for national defense purposes, BLM points out that this withdrawal was made pursuant to an agreement between the United States and Canada which was entered into for the mutual defense interests of both countries.

The Board concludes that PLO 1887 established a withdrawal for national defense purposes within the exception in § 11(a)(1) of ANCSA.

[1] The phrase "national defense purposes" is not a term of art, and does not have a precise legal meaning. It is a broadly inclusive descriptive term. Neither the express language of ANCSA, nor the legislative history of the Act, draws any distinctions between withdrawals for "national defense purposes" and withdrawals used to create military reservations, in the sense of Air Force bases or Army posts, or to reserve lands for other military uses.

PLO 1887, typically, was withdrawn under the statutory authority of the General Withdrawal Act of June 25, 1910 (the Pickett Act), which authorized the President to "temporarily withdraw from settlement, location, sale, or entry any of the public lands * * * and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes." (36 Stat. 847, 43 U.S.C. § 141 (1970) (repealed by P.L. 94–579, title VII, § 704(a) Oct. 21, 1976, 90 Stat. 2744, 2792).) While this listing of public purposes for withdrawals does not expressly include military uses, Pickett Act withdrawals have frequently been used to create military reservations. In determining whether the Army had authority to grant an easement over lands withdrawn for the military, the Interior Board of Land Appeals dealt with a withdrawal made under both the Pickett Act, and the inherent Presidential authority to create permanent withdrawals. Pointing out that the executive order authorizing the withdrawal in question referred to both the President's inherent and his statutory Pickett Act authority, IBLA commented, "The Pickett Act, *supra*, also granted authority to the President to withdraw land for military purposes." (*Alaska Pipeline Co.*, 38 IBLA 1, 12 (1978).)

Before the enactment of ANCSA, Congress was well aware of the existence of military withdrawals in Alaska. However, discussion of the term "national defense purposes," as used in various bills preceding ANCSA, never distinguished this term from other military uses. Concern focused, instead, on whether lands used by the military without benefit of formal withdrawal would be protected from Native selection. To this end, it was suggested that the exception protecting "lands withdrawn for national defense purposes" be changed to read "lands withdrawn *or otherwise reserved* for national defense."

Thus, commenting on the exception in a letter dated Aug. 2, 1969, to the Chairman of the Senate Committee on Interior and Insular Affairs, Phillip N. Whittaker, Assistant Secretary for the Air Force, Installations and Logistics, stated:

> *The Department of Defense has numerous military installations throughout Alaska located on public lands that have been withdrawn, reserved, or otherwise restricted from further appropriation under the public land laws. It is necessary that the integrity of these lands be preserved in the interest of national defense. The exception in section 8(a)(1) with respect to lands withdrawn for national defense purposes other than petroleum reserve numbered 4 would appear to recognize this interest.* However, in order to assure that public lands used for defense purposes by means other than withdrawal, such as by special use permit or notation on the public land records, are also excepted, it is suggested that line 11, page 16, be revised to read, "State of Alaska, except lands withdrawn or otherwise reserved for national defense." Paragraph (2) of section 8(a) should also be revised by the insertion of "withdrawn or otherwise reserved for national defense" as between "lands" and "described" in line 8 of page 25 of the bill. (Hearings on H.R. 13142 and H.R. 10193 before the Subcomm. on Indian Affairs, House Comm. on Interior and Insular Affairs, 91st Cong., 1st Sess., Part 1, 47, 48 (1969).) [Italics added.]

Thus, referring to "numerous military installations throughout Alaska located on public lands that have been withdrawn," Mr. Whittaker cited a need to preserve the integrity of these lands, "in the interest of national defense," and believed that an exception with respect to lands withdrawn "for national defense purposes" recognized this interest. There is no indication that Congress thought otherwise. Certainly nothing in the legislative history or the language of ANCSA indicates any effort or intention to create a class of lands withdrawn "for national defense purposes," as separate and distinct from other lands withdrawn for use by the military services. Since the purpose of the military forces, by definition, is national defense, such distinctions would be difficult to make. In the total absence of statutory or regulatory guidelines, the Board believes it unreasonable to try to make them.

[2] Where neither the express language, nor the legislative history of ANCSA draws any distinction between withdrawals "for national defense purposes" and withdrawals for military reservations

or other military uses, a withdrawal for use of the Department of the Army for terminal facilities in connection with a petroleum products pipeline system is considered to be a withdrawal "for national defense purposes" within the meaning of § 11(a)(1) of ANCSA.

The Board also considered the relationship of the joint defense agreement between the United States and Canada with PLO 1887.

Paragraph 1 of the United States note proposing the agreement states:

> I have the honor to refer to discussions which have taken place in the Permanent Joint Board on Defense, and subsequently between representatives of our Governments concerning a proposal for an oil pipeline installation from Haines to Fairbanks, Alaska, passing through northwestern British Columbia and Yukon Territory, to be constructed, owned and operated by the Government of the United States of America *in the mutual defense interest of both countries.* [Italics added.]

In paragraph 5 of the Annex to the above-quoted note, the United States agreed "to give assurance of equal consideration to Canadian defense requirements with those of the United States." Paragraph 3 of the Annex reads, in part, as follows: "It is mutually agreed that the common *defense interests* of the two countries will require continuance of the pipeline for a minimum period of twenty years." [Italics added.]

PLO 1887 was issued as a result of this agreement.

The Board concludes that the existence of the 1953 joint defense agreement between the United States and Canada lends additional support to the characterization of PLO 1887 as a withdrawal "for national defense purposes" within the meaning of the exception in § 11(a)(1) of ANCSA.

Withdrawal Status During Selection Period

The second issue is whether the lands in question remained withdrawn for national defense purposes on Dec. 18, 1971, and at all times during the selection period provided by ANCSA, or whether events occurred which changed the status of the land withdrawal and made the lands available for selection before the expiration of the selection period.

First, the Board considers events prior to the passage of ANCSA, and finds that the lands in question remained withdrawn for national defense purposes on the date of enactment of the Act, Dec. 18, 1971.

The appellant asserts that the Secretary of the Interior had authority under the Pickett Act, *supra*, through delegations in Executive Order No. 10355, 17 FR 4831 (1952) to revoke PLO 1887. The appellant asserts that the Secretary should have done so, because a series of events changed the character of the land withdrawal and made it appropriate to classify the lands as available for Native selection under ANCSA.

Events on which the appellant relies for this contention are: the determination by the Army in May of 1970, that the pipeline was no longer required for its needs; the decision by the Assistant Secretary of Defense, in June of 1971, to declare the entire system excess; the preliminary report of excess in June of 1973; and the transfer of jurisdiction over the land to GSA in November of 1974. Of these events two—the Army's 1970 determination and the Defense Department's 1971 decision to excess—occurred before the enactment of ANCSA on Dec. 18, 1971, upon which date the statutory withdrawals of land for Native selection, mandated by § 11(a)(1), took place.

The Board disagrees with the appellant's contentions because they run contrary to the essential nature of national defense withdrawals and the intent of ANCSA.

As has been discussed, the authority for withdrawals for national defense and other public purposes is the Pickett Act, *supra*. The President's authority under this Act was delegated to the Secretary by Executive Order No. 10355, 17 FR 4831 (1952). Sec. 141 of 43 U.S.C. (1970) (Pickett Act) not only sets out the procedure for establishing withdrawals but also specifically and unambiguously provides how such withdrawals are to be terminated.

> The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, *and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.* [Italics added.]

It appears clear from a reading of this statutory provision that a withdrawal can only be revoked by the Secretary or by Congress and not by a change in the actual use or even nonuse of the withdrawal. In support of this position, the Board looks to *Alaska Pipeline Co.*, 38 IBLA 1 (1978) in which BLM unsuccessfully argued *inter alia* that the relinquishment of jurisdiction by the Army and acceptance of jurisdiction by BLM of lands withdrawn pursuant to Executive Order No. 10355 constituted a revocation of that withdrawal. The Interior Board of Land Appeals stated:

> We note initially that E.O. 10355, which was effectively revoked by section 704(a) of FLPMA, 90 Stat. 2792, provides, in relevant part, that the Secretary of the Interior is delegated the full withdrawal authority of the President emanating from both the Pickett Act and the President's inherent authority: "including the authority to modify or revoke withdrawals and reservations of such lands heretofore or hereafter made." It further provides that: "All orders issued by the Secretary of the Interior under the authority of this order shall be designated as public land orders and shall be submitted * * * for publication in the Federal Register." *Nothing in this Executive Order, however, impels the conclusion that the relinquishment of jurisdiction over land withdrawn constituted a revocation of the withdrawal. In point of fact, it did not. The withdrawal, itself, remained in effect unless it was revoked in accordance with the pro-*

cedures outlined in E.O. 10355. [Italics added.]

38 IBLA at 17.

The Department of the Interior has consistently affirmed the position that a withdrawal remains in effect until revoked, even though the purpose of the withdrawal has been fulfilled. (*See, e.g., Oliver and Robert A. Reese, Silver Associates, Inc.*, 4 IBLA 261, 265 (1972); *Grace Kinsela*, 74 I.D. 386 (1967).) Further, it has been established that actual use of withdrawn lands is immaterial to the legal status of the lands under the withdrawal. As sated in *David W. Harper, et al.*, 74 I.D. 141, at 142, 149 (1967):

> Lands which have been withdrawn from entry under some or all of the public land laws remain so withdrawn until the revocation or modification of the order of withdrawal, and *it is immaterial whether the lands are presently being, or have ever been, used for the purpose for which they were withdrawn.* [Italics added.]

See, e.g., United States v. *Milton Wichner*, 35 IBLA 240 (1978); *John C. Amonson*, 8 IBLA 346 (1972). Even in cases where a withdrawal should have been revoked but was not because of an administrative oversight, the legal status of the withdrawal is not altered. In *Tenneco Oil Co.*, 8 IBLA 282, 283–284 (1972), the Board stated:

> Be that as it may, the consistent position of this Department has been that lands which are withdrawn from entry under some or all of the public land laws remain so withdrawn until there is a formal revocation or modification of the order of withdrawal. The mere passage of time or the accomplishment of an avowed purpose cannot serve as a substitute for the formal restoration.

[3] From this analysis of the Pickett Act and related Departmental decisions, the Board finds that in determining whether a national defense withdrawal exists as of Dec. 18, 1971, within the meaning of § 11(a)(1) of ANCSA, BLM must consider only the formal legal status of the withdrawal and it is immaterial whether the purpose of the withdrawal has been fulfilled or the actual use to which the land has been put has changed.

ANCSA, in § 3(e), gives the Secretary broad authority to determine what lands, other than national defense purpose withdrawals, were excluded from the withdrawal for Native selection made by § 11(a)(1) on the grounds that they were "actually used in connection with the administration of any Federal installation" and, therefore, were not "public lands" as defined by § 3(e). In contrast, § 11(a)(1) simply states that withdrawals "for national defense purposes" are excluded from the general withdrawal for village selections. No standards or procedures are established for the Secretary of the Interior—or any other official—to determine whether all lands within withdrawals for national defense purposes are "actually used" for such purposes.

[4] By virtue of this distinction, the Board finds that ANCSA does not give the Secretary of the Interior authority to make factual de-

terminations as to the actual use of land which is withdrawn for national defense purposes, resulting in removal of such land from the protection of the exception in § 11(a)(1).

It has been argued that even if the lands in question were not withdrawn on Dec. 18, 1971, for village selection, events occurred prior to Dec. 18, 1974, which changed the legal status of the withdrawal thereby making the lands available for selection. The appellant here relies on the preliminary report of excess, issued in June of 1973, the Notice of Intent to Relinquish issued in August of 1973, and the transfer of jurisdiction over the lands to GSA in November of 1974. Based on its review of the process by which withdrawals are revoked and the process, further, by which the Federal Government can surplus or relinquish ownership of property, the Board concludes that nothing occurred which altered the legal status of the lands withdrawn by PLO 1887 as a reservation or withdrawal for national defense purposes between Dec. 18, 1971, and Dec. 18, 1974.

[5] The Army's initiation of the relinquishment process by filing a notice of intention to relinquish certain property cannot revoke a national defense withdrawal because the Army lacks the authority to revoke such withdrawals. The Pickett Act provides that withdrawals "shall remain in force until revoked by him [Secretary of the Interior] or by an Act of Congress."

[6] A notice of intention to relinquish does not automatically revoke a withdrawal. The regulations set forth in 43 CFR Part 2370 make it clear that the notice is merely the first step of a process whereby a Federal agency can relinquish lands withdrawn or reserved for its use. (*See* 43 CFR 2372.1, 2372.2, and 2374.2.) A notice of intention to relinquish property is not a final action but a method by which an intention is expressed by one agency of the Federal Government to relinquish at a future time upon the completion of certain statutory and regulatory procedures.

It has been argued that even if the lands in question were excluded from the general § 11(a)(1) withdrawal on Dec. 18, 1971, because they were withdrawn for national defense purposes on that date, nevertheless, the Secretary had authority to withdraw the lands for Native selection at a later date if the withdrawal for national defense purposes were revoked.

However, the Board does not rule on this issue because the lands in question remained withdrawn for national defense purposes through the close of the selection period.

BLM Procedure

The third principal issue to be addressed is whether BLM erred by failing to follow the applicable statutes, regulations, and an agreement with another Federal entity, and thereby unlawfully denied the appellant its selection rights.

Appellant argues that BLM erred in administering these lands

pursuant to the Federal Property and Administrative Services Act, *as amended* (63 Stat. 378; 40 U.S.C. § 471 *et seq.* (1976)), because it was superseded by the general intent of ANCSA. ANCSA, it is asserted, gives village applications priority over any appropriation of Federal land and so when the notice of intent to relinquish was filed by the Army, BLM should have declared the lands available for selection by appellant.

It is argued that BLM was required by its own regulations (43 CFR 2372.3 and 2374.1) to make a determination as to whether or not the lands in question were suitable for return to the public domain and BLM failed to make such a determination.

Further, the appellant contends that BLM unlawfully denied its selection rights by failing to follow the DOI/GSA Agreement. Appellant refers to part of Sec. II.c.(1) of this agreement which reads:

> c. As soon as practicable after receipt of notification of the availability of surplus acquired land, the Department of the Interior will make a determination as to whether or not the land may be subject to selection under the Settlement Act.
>
> (1) Where it is determined that the land may be subject to selection, the Department will file a request for transfer of the property with the appropriate GSA Office in the following circumstances:
>
> (a) Where the land is within a Section 11(a)(1) withdrawal.

Appellant argues that because the notice of intent to relinquish had been filed, the lands in question became surplus and the provisions of the DOI/GSA Agreement applied. Further, appellant takes the position that this DOI/GSA Agreement established and improper preference in Federal agencies to take excess property before it was offered to Native corporations for selection. Appellant cites the report by the Comptroller General of the United States issued June 21, 1978, wherein the Comptroller addressed the issue of reported excess lands:

> *REPORTED EXCESS LAND NOT OFFERED TO NATIVES*
>
> The General Services Administration (GSA) and the Bureau are responsible for disposing of unused property voluntarily declared excess by Federal agencies. When such excess is not suitable for return to public domain, it is offered to other Federal agencies, and if there is no further Federal need, it is offered to a variety of non-Federal groups in accordance with existing laws and regulations. *After the act was passed, the Secretary did not arrange to modify this process to include the Native corporations' rights to such unused lands under the act . . .*
>
> We told Interior officials that the agreement giving Federal agencies priority over Native Corporations was not proper, and we suggested that Native corporations be provided first priority to excess Federal lands within their selection area. *Department officials agreed with our view*, but as of March 1978 no action had been taken to (1) define Native corporation rights to unused agency land and include these rights in the Federal property disposal procedures or (2) identify and reinstate as public land all property disposals that

were made in violation of the Native corporation rights as so defined.

Appellant's Memorandum in Support of its Statement of Reasons, p. 13.

With respect to these three arguments raised by appellant, BLM counters that it did, in fact, follow all steps required under applicable law, rules and regulations and other procedures in administering the lands here in controversy. The Board agrees.

[7] The issue of whether ANCSA supersedes certain provisions of the Federal Property and Administrative Services Act, *supra*, as regards administrative actions taken concerning a specific withdrawal is rendered moot by a finding that the withdrawn lands were never available for selection under ANCSA. When a notice of intention to relinquish affects lands not withdrawn pursuant to ANCSA, BLM is required to follow the provisions of the Federal Property and Administrative Services Act, *supra*, and the regulations promulgated under that Act.

These statutory and regulatory provisions require that a number of steps be taken by the Federal Government before its property can be transferred to outside interests. Basically, BLM was required to first make a field examination of the lands to ascertain whether the lands were suitable for return to the public domain (43 CFR 2372.3 and 2374.1). Because BLM found the lands were unsuitable for return to the public domain because of the improvements made on the lands, BLM was required to notify the Army to report the lands and improvements to GSA as excess property (43 CFR 2374.1(c)). The record reveals that these steps were appropriately taken.

Appellant strongly argues that the Secretary of the Interior has, in numerous instances, been able to revoke national defense withdrawals and thereafter has withdrawn those same lands for Native selection. BLM contends, and again the Board concurs, that there is a significant distinction between those instances and the case here on appeal. The distinction rests in the fact that before the Secretary can revoke such a withdrawal, one of two events must occur and, under the facts of this case, neither of the necessary events transpired. Basically, before the Secretary can take withdrawal action, BLM must either determine that the lands are suitable for return to the public domain or, if the BLM finds them to be unsuitable, then GSA must determine that the lands are "surplus" property and transfer them to BLM. In either of these situations a Federal withdrawal could be revoked by the Secretary and he could simultaneously withdraw the lands for Native selection. However, in this case, the record reveals that BLM found the lands to be unsuitable for return to the public domain, GSA did not determine they were surplus within the selection period, and therefore, BLM could not revoke the withdrawal.

When a notice of intention to relinquish a national defense withdrawal has been filed, BLM subsequently determines that the lands are not suitable for return to the public domain and GSA does not determine the lands to be "surplus property," the Secretary of the Interior lacks authority to revoke the national defense withdrawal. Any questions involving the Secretary's authority to simultaneously withdraw those lands for Native selection pursuant to ANCSA are therefore moot and the Board does not rule on such issues.

Appellant strenuously argues that because the lands withdrawn by PLO 1887 were determined to be excess they became available under the terms of the DOI/GSA Agreement for village selection. The language here relied on is found in Sec. II.c.(1) and provides, in pertinent part:

> c. As soon as practicable after receipt of notification of the availability of *surplus* acquired land, the Department of the Interior will make a determination as to whether or not the land may be subject to selection under the Settlement Act.
>
> (1) Where it is determined that the land may be subject to selection, the Department will file a request for transfer of the property with the appropriate GSA Office in the following circumstances:
>
> (a) Where the land is within a Section 11(a)(1) withdrawal. [Italics added.]

The Board finds first that the property withdrawn by PLO 1887 was not surplus property under the terms of the DOI/GSA Agreement at any time during the selection period and therefore BLM did not act in such a way as to violate that agreement. Before the above-quoted provision would become applicable, GSA first had to make the determination that the lands were "surplus" and not required for any Federal Government needs. In this particular case GSA never made the necessary surplus determination during the selection period and, therefore, the lands never became subject to Sec. II.c.(1) of the DOI/GSA Agreement.

[8] Having determined that the lands in question were withdrawn for national defense purposes during the selection period, BLM was required to reject appellant's selection applications for such lands pursuant to regulations in 43 CFR 2091.1, which provide in pertinent part:

> Rejection of applications.
>
> Except where regulations provide otherwise, all applications must be accepted for filing. However, applications which are accepted for filing *must be rejected and cannot be held pending possible future availability of the land* or interests in land, when approval of the application is prevented by:
>
> (a) Withdrawal or reservation of lands: *except* that this does not prevent the filing of applications by village and regional corporations under 43 CFR Parts 2561 and 2652 for public lands withdrawn under section 11(a)(1) of the Alaska Native Claims Settlement Act (43 U.S.C. 1601), *unless the lands are withdrawn for the national park system or are withdrawn or reserved for national defense purposes.* [Italics added.]

Since the lands in question were not withdrawn for selection by § 11(a)

(1) of ANCSA and were not otherwise made available prior to Dec. 18, 1974, through a public land order revoking PLO 1887 and withdrawing the lands for selection by appellant, 43 CFR 2091.1 required BLM to reject the selection application.

Finally, the Board has considered appellant's argument that because BLM had full authority to make the lands in question available for selection but failed to do so, there rests an equitable claim in the appellant for these lands. The Board disagrees. Such a claim can be recognized only if the governmental conduct complained of amounts to "affirmative misconduct." *United States* v. *Ruby Co.*, 588 F.2d 697, 703–4 (9th Cir. 1978). The Board does not find the Government's conduct in this case amounting to affirmative misconduct. *Cf. United States Immigration & Naturalization Service* v. *Hibi*, 414 U.S. 5 (1973); *See also Simon* v. *Califano*, 593 F.2d 121 (9th Cir. 1979).

Therefore, BLM's Decision F–14943–B rejecting selection by Tanacross, Inc. of lands within PLO 1887 is hereby affirmed.

This represents a unanimous decision of the Board.

JUDITH M. BRADY
Administrative Judge

ABIGAIL F. DUNNING
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

DANIEL BROTHERS COAL CO.

2 IBSMA 45

Decided *April 10, 1980*

Appeal by Daniel Brothers Coal Co. from a Mar. 18, 1980, decision of Administrative Law Judge David Torbett sustaining Notice of Violation 79–II–92–5 and denying Daniel Brothers' application for temporary relief (Docket No. NX 0–102–R).

Affirmed.

1. Statutes—Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: Generally

One seeking an exemption from the coverage of a statute, especially a statute whose purpose is corrective, must affirmatively demonstrate entitlement to that treatment.

2. Estoppel—Surface Mining Control and Reclamation Act of 1977: Small Operators

A party seeking to estop the Office of Surface Mining Reclamation and Enforcement from asserting that the party did not have a small operator exemption for a particular permit must clearly demonstrate its entitlement to the estoppel.

3. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally

Affidavits to support allegations of fact in a motion for summary decision filed pursuant to 43 CFR 4.1125 are not necessary when there is no disputed issue as to any material fact.

APPEARANCES: David O. Smith, Esq., and Marcia A. Smith, Esq., Corbin, Kentucky, for Daniel Brothers Coal Company; John Phillip Williams, Esq., Office of the Field Solicitor, Knox-

ville, Tennessee, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Daniel Brothers Coal Co. (Daniel Brothers) has appealed from a Mar. 18, 1980, summary decision by Administrative Law Judge David Torbett sustaining Notice of Violation 79–II–92–5 containing one violation for allegedly failing to eliminate a highwall and restore the disturbed area to approximate original contour in violation of 30 CFR 715.14. The notice was issued pursuant to sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977 (Act).[1] Also Daniel Brothers' application for temporary relief was denied.

For the reasons stated below, the Administrative Law Judge's decision is affirmed.

Factual and Procedural Background

On Dec. 20, 1979, an OSM inspector visited Daniel Brothers' Deep Creek mine in Whitley, Kentucky, and the next day issued Notice of Violation 79–II–92–5. Daniel Brothers filed an application for review on Jan. 21, 1980, seeking vacation of the notice and arguing that OSM should be estopped from asserting that Daniel Brothers did not have a small operator exemption for Kentucky State permit No. 118–0001, issued on Aug. 21, 1978, pursuant to which mining had been undertaken at the Deep Creek mine.[2] Daniel Brothers received permit No. 118–0001 on Aug. 21, 1978.

On Feb. 11, 1980, OSM filed an answer to the application for review stating that Daniel Brothers never received a small operator's exemption for permit No. 118–0001; that OSM had granted an exemption for another Daniel Brothers' mine, permit No. 5779–76; and that even if Daniel Brothers had applied for an exemption for permit No. 118–0001, it could not have received an exemption because that permit was not issued until Aug. 21, 1978, and according to 30 CFR 710.12(b)(2), the exemption was not available for a permit or renewed permit issued on or after Aug. 3, 1977.

On Mar. 14, 1980, OSM filed a motion for summary decision pursuant to 43 CFR 4.1125, stating that the pleadings failed to demonstrate a dispute as to any material fact. Daniel Brothers filed an application for temporary relief on Mar. 17, 1980. The following day the Administrative Law Judge granted

[1] 30 U.S.C. § 1271(a)(3) (Supp. I 1977).

[2] The small operator exemption provision of the Act, 30 U.S.C. § 1252(c) (Supp. I 1977), allowed operators who filed applications pursuant to 30 CFR 710.12, and who met certain qualifications, to be exempt from complying with various sections of the Act and regulations, including the elimination of highwalls and return to approximate original contour provisions, until Jan. 1, 1979.

OSM's motion and issued his summary decision.

Daniel Brothers filed an appeal with the Board on Mar. 25, 1980. It does not deny the existence of a highwall at its Deep Creek mine. However, it seeks to avoid the requirement that the area be returned to approximate original contour by asserting that OSM should be estopped from enforcing that requirement because appellant believed it had a small operator exemption for permit No. 118–0001.[3]

Appellant bases its estoppel theory on the argument that it relied on representations and actions by State officials that its operations pursuant to permit No. 118–0001 were covered by the small operator exemption, and that it also relied on an Oct. 6, 1978, form letter from OSM which indicated to appellant that it had the exemption for permit No. 118–0001. Appellant contends that because of such representations it did not return the area mined prior to Jan. 1, 1979, to approximate original contour and that requiring appellant to do so at this time would cause great financial hardship.

Discussion

The Congress did not enact the Surface Mining Control and Reclamation Act of 1977 for the purpose of exempting persons from its strictures. It was enacted, among other reasons, to protect the environment and to insure the reclamation of mined areas.[4] The proviso that certain small operators are exempted from some of the performance standards is an exception to the general requirement of the Act.[5] The Secretary enacted regulations which provided how the exemption could be obtained.[6] Among the requirements was that of making

[3] There is no question that appellant neither applied for nor ever actually received a small operator exemption for permit No. 118–0001.

[4] 30 U.S.C. § 1201 (Supp. I 1977) states: "The Congress finds and declares that—

* * * * * * *

"(c) many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources."

30 U.S.C. § 1202 (Supp. I 1977) reads in pertinent part:

"It is the purpose of this chapter to—

* * * * * * *

"(d) assure that surface coal mining operations are so conducted as to protect the environment;

"(e) assure that adequate procedures are undertaken to reclaim surface areas as contemporaneously as possible with the surface coal mining operations."

[5] 30 U.S.C. § 1252(c) (Supp. I 1977) established that a small operator exemption was available to a surface coal mining operation that:

1. Was in operation pursuant to a state permit issued before August 3, 1977;
2. Held a permit issued to a "person" in existence before May 2, 1977; and
3. Had total annual production of coal which did not exceed 100,000 tons.

[6] 30 CFR 710.12; *see also* comment 9, Part 710—Initial Regulatory Program, 42 FR 62642 (Dec. 13, 1977). 30 CFR 710.12(e) required that the "request for exemption shall be in the form of an affidavit under oath." 30 CFR 710.12(g)(1) states that the exemption shall be granted if "[t]he permittee has satisfied his burden of proof by demonstrating eligibility for the exemption."

written application to OSM in a specified manner by May 3, 1978.[7]

The permit in question was issued on Aug. 21, 1978, and no request in any form was ever made to OSM for an exemption for that permit. Consequently, the record shows that the statutory requirement that the permit to be exempted be in existence before Aug. 3, 1977, was not met. Nor were the regulatory requirements satisfied that an exemption request be made before May 4, 1978, and that it be made in a certain affidavit form.[8]

[1] The authorities are in agreement that one seeking an exception from the coverage of a statute must affirmatively demonstrate entitlement to that treatment. *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Comm'n*, 286 U.S. 299 (1932); *United States* v. *McElvain*, 272 U.S. 633 (1926); *Ryan* v. *Carter*, 93 U.S. (3 Otto) 78 (1876); *United States* v. *Dickson*, 40 U.S. (15 Pet.) 141 (1841). This is especially so for statutes whose purpose is corrective. *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Comm'n*, *supra*. Daniel Brothers would have the Board recognize its entitlement to a small operator exemption on the basis of equitable considerations, rather than on the basis of entitlement under the terms of the Act and implementing regulations. As is discussed below, however, Daniel Brothers has not established entitlement to relief on equitable grounds.

Daniel Brothers proposes to carve a small operator exemption out of the law by invoking the doctrine of equitable estoppel.[9] Even if that doctrine might ever be applicable to the activities of OSM, it is not in these circumstances. Without retracing the tortuous path of those who have sought equitable estoppel against the Federal Government, it will suffice to say that the prevailing standard is that each of the following four elements must be present:

(1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury. [*United States* v. *Georgia-Pacific Co.*, 421 F.2d 92, 96 (9th Cir. 1970).]

After *Georgia-Pacific*, *supra*, was decided, the same circuit held that a letter from a Government official containing a circular and a summary of existing law could not estop

[7] While 30 CFR 710.12(d) indicates the date to be March 1, 1978, it was extended to May 3, 1978. *See Wilkinson's, Inc.*, 1 IBSMA 1 (1978).

[8] Apparently Daniel Brothers is a partnership (Exh. 7 to appellant's brief on appeal. No showing has been made in this case as to when that partnership was established, thereby opening to question whether it was a person in existence before May 2, 1977, as required by 30 U.S.C. § 1252(c) (Supp. I 1977).

[9] Even though the Board does not accept the applicability of estoppel to this situation, we do wish to acknowledge the authoritative brief on the topic submitted by Daniel Brothers. All too often the authorities to which we are referred are the ubiquitous "It is clear . . ." and "As is well known . . ." Occasionally we are favored with a reference to a hornbook; sometimes even the specific section of the text is cited. Counsel for Daniel Brothers has not followed this customary practice and we appreciate it.

the Government. Although there might have been a misunderstanding of the contents by the citizen, there was no active misrepresentation by the Government agent. *United States* v. *Consolidated Mines & Smelting Co., Ltd.*, 455 F.2d 432 (9th Cir. 1971); *see also United States* v. *Ruby Co.*, 588 F.2d 697 (9th Cir. 1978).

[2] Daniel Brothers claims to have relied to its potential detriment on advice received from a third party who in turn relied on telephone counsel received from an unknown OSM employee at an undetermined time.[10] Daniel Brothers' reliance is purportedly buttressed by an Oct. 6, 1978, letter received from an OSM official referring to an exemption "received" by Daniel Brothers. While appellant applied for an exemption for three of its permits, OSM only granted an exemption for permit No. 5779-76, not the one at issue here. None of this is sufficient, separately or together, to establish an equity that would justify an estoppel of OSM to enforce the provision of the Act.[11] Indeed, the equities are with OSM in light of a permittee who failed to make a timely request in an approved form, and who, if a timely request had been made would not have been entitled to the exemption anyway.

The remaining question is whether this matter was in a proper state for disposal by summary decision. 43 CFR 4.1125 provides for summary decisions upon the record. Subsection (b) states that the movant "shall verify any allegations of fact with supporting affidavits." OSM furnished no affidavits to the Administrative Law Judge.[12] Subsection (c) authorizes the granting of a motion for summary decision when the record shows that there "is no disputed issue as to any material fact" and summary decision is proper as a matter of law. Although 43 CFR 4.1125 is not an exact counterpart of Rule 56 of the Federal Rules of Civil Procedure providing for summary judgments, there is sufficient correspondence in the manner relevant here to avail ourselves of some of the constructions made of Rule 56.

[3] Reason requires, and courts have held, that only when a material fact remains in issue is summary disposition absolutely inap-

[10] Daniel Brothers asserts that it relied upon the advice of representatives of the Commonwealth of Kentucky that it had an exemption for all of its operations, not merely the one specified in the granting of the exemption to permit No. 5779-76 (Exh. 8 to appellant's brief on appeal).

[11] Without going any further into why it cannot be concluded that the OSM official who sent the Oct. 6 letter intended to convey improper information for Daniel Brothers to act upon, nothing in the record supports the proposition that Daniel Brothers was ignorant of the facts—an indispensable element of the *Georgia-Pacific* rule. Daniel Brothers' experience with OSM's small operator exemption procedures—three requests, two denials, one granted—leads to no reasonable conclusion other than that there was no excusable ignorance of the true facts.

[12] Not until the matter arrived here on appeal did OSM submit an affidavit concerning: (1) that there were three requests for exemption made by Daniel Brothers (two denied and one granted); (2) that no request was made and no exemption was issued for permit No. 118-0001; and (3) that the OSM letter of Oct. 6, 1978, concerning small operator exemptions, was a form letter sent to every person in the United States who had received an exemption. Exhibit A to appellee's brief. In its brief, appellant concedes the accuracy of all of these assertions except that of the existence of a form letter and that of its universal distribution.

propriate. *E. P. Hinkel & Co., Inc.* v. *Manhattan Co.*, 506 F.2d 201 (D.C. Cir. 1974); *Dewey* v. *Clark*, 180 F.2d 766 (D.C. Cir. 1950). Affidavits to support allegations of fact in a motion for summary decision pursuant to 43 CFR 4.1125 are not necessary when there is no disputed issue as to any material fact. Moreover, the material facts are all contained in records of the Department; therefore, the Administrative Law Judge could have taken official notice of every material fact that Daniel Brothers asserts was not put forth in affidavit form. 43 CFR 4.24(b). OSM did not ask him to do so nor did he in terms do it. Nevertheless, upon the augmented record before us now, summary decision for OSM is certainly justified and no purpose would be served, in view of our decision concerning estoppel, by remanding solely for the purpose of making the hearing record a bit more tidy.

The decision of the Administrative Law Judge is affirmed.

MELVIN J. MIRKIN
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

MANTLE RANCH CORP.

47 IBLA 17

Decided *April 11, 1980*

Appeal from denial of an application to reform and amend homestead patent number 1052943 (D–041587).

Reversed.

1. Conveyances: Generally — Federal Land Policy and Management Act of 1976: Conveyances

Where evidence is persuasive that certain land was included in a homestead patent as the consequence of an error in description, and other land was settled, improved and occupied for several decades thereafter, an application to reform the patent will be allowed where the concerned administrative agencies do not object, the Government's interests are not unduly prejudiced, no third party's rights are affected, and substantial equities of the applicant will thereby be preserved.

APPEARANCES: James D. Robinson, Esq., Meeker, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

INTERIOR BOARD OF LAND APPEALS

An historical narrative of the background events leading to this appeal is necessary to a proper perspective of the case.

The record indicates that Charles T. Mantle, born in 1898, was reared in the vicinity of the subject land. Upon being discharged from the army following World War I, Mantle settled on remote, isolated, and rugged public land in the canyon along the Yampa (or "Bear") River in the spring of 1919. He made extensive improvements, including a house, barn, corrals, fences, a 1,200-foot irrigation ditch, sheds, a storage cellar, and planted a field with sweet clover and alfalfa.

plus a truck garden and an orchard of 48 fruit trees. His principal operation apparently was cattle, as he was then running between 200 and 300 head. He married in 1926 and several children were born of the marriage. The family resided on the land to the exclusion of a home elsewhere.

It was not until April 1929, 10 years after he settled the land, that Charles Mantle made application for a homestead entry pursuant to the Act of Sept. 5, 1914.[1] His application described the land as follows: "S½NE¼, E½NW¼, Sec. 18, T. 6 N., R. 102 W., 6th Principal Meridian."

This land, as well as other adjoining lands, had been included within a powersite withdrawal dated Aug. 2, 1919. However, upon Mantle's submission of proof that his settlement and occupancy predated the withdrawal, the Assistant Commissioner, General Land Office, ruled that his entry would be allowed without reservation under sec. 24 of the Federal Water Power Act, 41 Stat. 1063, 1075.

Inasmuch as Mantle had made compliance with the requirements of the Homestead Act and was an honorably discharged veteran of World War I, he was entitled to make a commutated (early) final proof of performance. Accordingly, in September 1930, an inspection of the entry was conducted by Edward Doyle, Examiner, General Land Office. Reference will be made later to certain details of Doyle's report. However, the tenor of the report was most favorable to the applicant, and concluded with Doyle's recommendation that the application be allowed. Mantle filed his final proof on Aug. 31, 1931, and on Jan. 26, 1932, a patent was issued to Mantle for the lands described in his homestead application, *supra*.

In 1937 Mantle began construction of a new home in the SW¼ NW¼ of sec. 17. The house was completed about 2 years later. It remains in good condition today and is still used by his son's family. Lands adjoining the house on three sides are under cultivation, and have been since the 1930's. Other improvements in this subdivision include an irrigation ditch, a fenced vegetable garden, a road to the house, also fenced, and a 4-strand barbed wire fence parallel to the river and extending into the SW¼ NW¼ of sec. 17. (The irrigation ditch and the river fence both originate on patented land in the S½NE¼ of sec. 18 and extend into the SW¼NW¼ of sec. 17.)

Another 40-acre subdivision not described in the patent is the NW¼ SE¼ of sec. 18. This land is moderately sloping to extremely steep and inaccessible. At least 30 acres are suitable for grazing, and have been used for this purpose for many years past. The only improvement on this subdivision is a jeep road of sufficient prominence to be depicted on a modern topographic map of the area.

[1] This was the statute providing for allowance of second homestead entries (38 Stat. 712). Mantle had originally made application for other land which he never improved or resided upon.

On Aug. 5, 1938, all of the unpatented land in the vicinity was included within the expanded area of the Dinosaur National Monument, under the administration of the National Park Service. The earlier powersite withdrawal was revoked.

On May 28, 1965, almost exactly 46 years after his original settlement of the land, and some 33 years after issuance of the patent, Charles Mantle filed application with the Colorado State Office of the Bureau of Land Management to amend his patent. He asserted that he had only recently discovered that his patent did not include the SW¼NW¼ of sec. 17, where his home and much of his cultivation and other improvements are situated, nor the NW¼SE¼ of sec. 18, which he has used for grazing and where the jeep road is. Instead, he discovered that the patent described 80 acres in the E½NW¼ of sec. 18, the greater portions of which is sheer or steep sandstone cliffs on the opposite side of the river from the improved portion of the ranch, and which is virtually inaccessible and unusable for any purpose associated with the ranch. In his application Mantle stated that at the time he filed his homestead application in 1929, he had a surveyor complete the papers for him, and he surmised that the surveyor used an old map which did not have the Yampa River properly located. Therefore, he proposed to relinquish the 80 acres of cliffs north of the river and asked that his patent be amended to include the two 40-acre tracts which are contiguous to the 80 acres correctly described in the patent.

In 1968 Charles T. Mantle conveyed the ranch to his children. In 1969, while camped out in the mountains of Mexico, he was reportedly murdered by bandits at his campsite. The application to reform the patent was refiled by Patrick Mantle, administrator of his father's estate. The ranch was incorporated as a family corporation.

In September 1972, BLM Realty Specialist Lyle T. Fox made a field examination of both the patented and unpatented lands involved in the Mantle application. His report, together with the photographs attached as exhibits provide a most graphic description of his findings and conclusions. Some excerpts from his report follow:

> The E½NW¼ of Section 18, which was also patented to Mantle, contains no improvements nor does it show evidence of clearing or cultivation. Because of steep, rugged topography, access from below is impossible and it is doubtful that livestock could have grazed the portion next to the river. Exhibit "B" shows the tract and the black line represents the southern boundaries.
>
> The two 40 acre tracts that Mantle claimed he intended to include in his homestead are both more physically suited for homesteading than the E½ NW¼ (Exhibit "B") that he included supposedly by mistake. The NW¼SE¼ of Section 18 is moderately sloping, to extremely steep and inaccessible from the canyon below. At least 30 acres of the tract are suitable for grazing and have been used for this in the past; however, they have not been cultivated and

whether they could be is questionable. Since there were no fences found on the tract, nor evidence of fences, it appears that livestock have grazed these slopes and others further downstream in past years. Besides a jeep trail, no other improvements were found on the tract. From the standpoint of utility, this tract fits the topography better than any portion of the E½NW¼ to form a better ranch operation with the S½NE¼. Refer to Exhibit "C" for a photo of that portion of the NW¼SE¼ of Section 18 that is accessible from below.

The SW¼NW¼ of Section 17 is the tract containing the most valuable improvements. Although the house is not the original that was built by Mantle and identified in Doyle's report, it has been there for approximately 36 years. According to Evelyn Mantle, who is the wife of the deceased applicant Charles Mantle, construction of the house began in 1937 and it was completed about 2 years later. It remains in good shape and is lived in during the spring, summer, and fall months. There is also an old log shed behind the house that appears to be older, but its exact age is unknown.

In conclusion, it appears quite obvious from the field examination that Mr. Mantle partially received patent to lands that were not physically suitable for homesteading. It also seems obvious that his original intentions were to include those lands along the river in the SW¼NW¼ of section 17. His intentions concerning the NW¼SE¼ of Section 18 are not quite so clear. However, as mentioned earlier, it definitely has more utility than any portion of the E½NW¼.

It should be further noted that after examining the area, it is easy to understand how a person could confuse the "lay of the land", especially if he was relying on the survey plat dated February 28, 1882, or the plat dated March 30, 1928. Both of these lack the necessary topographic features to show the true land picture. Even knowing the location of the ¼ corner between Sections 17 and 18, a person would be somewhat at the mercy of a land surveyor if he told you where your property line was. Because of the extremely rugged terrain along this section line, for a layman it would be a pure guess to identify its true location. Admittedly, it is rather difficult to understand how one could be off an eighth mile east of the line in a north-south distance of ¼ mile; however, it is not impossible.

Exhibit "B," referred to in the report, is a color photograph of the E½NW¼ sec. 18, and it depicts a huge, monolithic, sandstone block which rises vertically from the valley floor on the opposite side of the river from the improved land. It is virtually devoid of vegetation and appears to be so steep across its front elevation as to be insurmountable even by a mountain goat. It occupies the entire subdivision except for a small "apron" of relatively flat land lying between the outward-curving river bank and the base of the cliff.

Because the unpatented land surrounding the ranch had been included in the Dinosaur National Monument, BLM next made inquiry of the superintendent of the monument, which is under the National Park Service (NPS), also an agency of this Department. The superintendent responded in part:

> My problem was not being familiar with either the land situation or authority to amend the patent. Now that these are clear, we can see no reason for our disapproving the request of Mr. Mantle for the amendment.
>
> I can truthfully say that the Service is not happy with the amendment, but in all honesty, we are quite certain that the original claim by Charles Mantle was in

error, and we must honor the action by your office and Mr. Mantle.

The Rocky Mountain Regional Director, NPS, deferred comment until he could be provided with an opinion by the Office of the Regional Solicitor. Such an opinion was provided, and although it is not in the record before us now, it was obviously supportive of the application. An excerpt from a letter dated Dec. 12, 1974, from the Deputy Regional Director, NPS, to Tim Mantle follows:

> Our Regional Office recently received word of a pending application to amend the patent granted on your property at Dinosaur National Monument in 1932. Our land acquisition personnel have examined the records in the matter and discussed the application with the Bureau of Land Management and with the Regional Solicitor's office.
>
> Based on the facts of record, we believe the evidence indicates that an error was made at the time the original legal description was written. With this letter we would like to advise you that we have no objections to the request for amendment being approved as submitted, and in fact we are willing to do whatever we can to actually get the amendment approved. Our Division of Land Acquisition will continue to work with the technical experts in the Bureau of Land Management handling the application in the hope that the correction can be quickly entered, and the Superintendent and his staff will be available as needed.

At the same time, the Acting Regional Director, NPS, wrote the State Director, BLM, the following: "We recently received the opinion of the Regional Solicitor in Denver referred to in our Oct. 24, 1974 memorandum. Based on this opinion and our examination of the facts of the case, we have no objection to your proceeding to process the claim and approve it as submitted."

As, at this point, BLM, NPS, and the Regional Solicitor's office had all expressed approval of the amendment, BLM's next step was to call upon the applicant to execute and deliver an unrecorded warranty deed conveying title to the United States to the E½NW¼ of sec. 18. The deed was submitted to BLM, accepted, and returned to the applicant's attorney for recordation, together with a request that BLM be provided with (1) an abstract of title or a title insurance policy; (2) receipts evincing payment of all taxes for the subject lands; (3) a certified copy of Charles Mantle's death certificate and a release of the inheritance tax lien on his estate; and (4) a copy of a corporate resolution of the Mantle Ranch Corporation, authorizing the transaction.

The deed was recorded and the foregoing supporting documents were furnished BLM. They were then transmitted to the Regional Solicitor's office, together with the case file, for "review by your office of the conveyance and title documents submitted to us by the applicant." Although the Regional Solicitor was not asked to advise on the legal viability of the application, having already approved it, nevertheless that office responded with the following memorandum opinion to BLM's State Director:

While it appears that Charles Mantle may have misdescribed, in his Application, the land he intended to enter and that the present amendment may properly describe his intention, the amendment cannot be approved. The land covered by the present application was withdrawn from entry by Power Site Reserve No. 721 as of June 27, 1919. This withdrawal was construed by Power Site Interpretation No. 120 on June 29, 1928. While the withdrawal was revoked on July 8, 1974, all the land in Sections 17 and 18 were withdrawn for Dinosaur National Monument by the Act of September 8, 1960. Therefore, the land applied for in the subject application cannot be patented to the applicant, because it is neither presently available for entry nor was it available for entry in 1932 when the original patent was issued. *Frank H. and Claire E. Steffire*, 3 IBLA 255 (1971).

Although this opinion was in error, as we shall show, *infra*, its effect was to preclude the BLM State Office from finally approving the amendment application, as both the State Director, BLM, and the Regional Director, NPS, still wished to do.

On Apr. 28, 1977, the State Director forwarded the case record to the BLM Director with a memo stating:

In accordance with Organic Act Directive No. 77-24 we are forwarding to you the subject case file for review and analysis. This is a case in which the Regional Solicitor's Office refuses, because of a legal technicality, to approve amendment of the patent despite the presence of a good faith error.

It is clear from the facts in this case that the patent issued to Charles T. Mantle does *not* describe the land he intended to enter, actually did enter, occupied, and placed valuable improvements upon. The Solicitor, however, takes the position that because the lands entered and the lands described in the patent were withdrawn at the time of entry (and patent), the amendment cannot be approved, even though the withdrawal has since been revoked.

The Solicitor goes on to note that the lands are currently unavailable because of the withdrawal for the Dinosaur National Monument, even though the withdrawing agency (the National Park Service) has advised us by memorandum dated December 12, 1974 (see case file) that they have no objection to our processing the application.

We do not believe that after more than 40 years of paying taxes on the land, occupying it in good faith, and placing improvements thereon, a man should be deprived legal title because of this kind of technicality. This appears to us to be a case involving the kind of good faith error which Section 316 of the Federal Land Policy and Management Act of 1976 was designed and to deal with and which falls within the purview of the aforementioned Directive.

After reviewing the case, the Director found himself in agreement, and referred the matter to the Assistant Solicitor, Lands, with a memo, the final paragraph of which reads:

In this amendment of patent application, the equities and the approval of the National Park Service are all for the applicant. We have a proper case for amendment, and we have the statutory authority to proceed. We ask that you reverse the decision of the Regional Solicitor, Denver, and allow us to proceed to issue a new and correct patent.

In the meanwhile, NPS was becoming increasingly concerned. Since the deed conveying the E½ NW¼ of sec. 18 to the United States had been accepted by BLM and recorded, the county had lost 80 acres from its tax rolls, the Mantles continued their unauthorized occupancy of the lands applied for,

although they were apparently told they could no longer farm the land. Their holdings were reduced to 80 acres, and their income affected. NPS was in the position of having to defer enforcement of its own regulations regarding trespass, grazing, and "inholding" regulations and procedures. Therefore, the Regional Director, NPS, wrote to BLM's State Director on Feb. 7, 1979, as follows, in part:

> We realize your State office has done everything within its authority to bring the subject application to a point of decision. Nevertheless, the case is still pending. We recommend that you forward this memorandum, along with comments of your own, to your Washington office in an effort to expedite a decision on this issue. The National Park Service is in favor of allowing this patent amendment and believe the equities are in favor of the Mantles in this case.
>
> * * * * *
>
> We urge your support in obtaining a final decision from the Washington Solicitor's office acknowledging that the application is proper and that corrected patent should issue.

The case had become to the personal attention of the Secretary, and he requested the advice of the Solicitor. This was forthcoming in a memo from the Solicitor to Secretary dated Jan. 29, 1979. In it the Solicitor undertook to review the case record, evaluate the evidence, and form an opinion of the case on its merits. He concluded:

> [E]xcept for Charles Mantle's statement in his application, there is nothing in the record to indicate that a mistake has been made.
>
> * * * * *
>
> * * * Mantle is simply now asking for new lands without real justification. From this perspective, Mantle simply trespassed when he moved a quarter of a mile off the eastern boundary of his patented lands in 1937, built a new dwelling, and began to improve these lands.

The Solicitor's memo also states: "It is also clear to me that the Regional Solicitor is correct. Even assuming Mantle made an honest mistake because Dinosaur National Monument closed the lands Mantle now wants we cannot without legislation, correct that mistake by withdrawing lands from the Monument and making them available to Mantle."

The case file, together with a copy of the memo, was then transmitted back to the Director, BLM, under cover of a transmittal memo by an attorney in the Solicitor's office. There is nothing in the record to show that Secretary Andrus ever made a decision on the case or issued any instructions concerning it. The case was in turn transferred to the State Director, Colorado, by memo from the Acting Associate Director,[2] instructing the State Director to prepare a decision denying the application to amend the patent.

[2] This memo erroneously states, "Since there has been no acceptance of the conveyance of E½NW¼, sec. 18, T. 6 N., R. 102 W., 6th principal meridian, no reconveyance is required so long as the deed is returned." A handwritten note in the file states, "Warranty Deed returned to Mr. Tim Mantle with decision of April 11, 1979, rejecting application to amend patent. JRB—4/11/79." This was incorrect. The record shows that BLM formally accepted the deed by its letter dated July 20, 1976, and returned it to appellant's lawyer with instructions that it be recorded. It was subsequently recorded on Oct. 15, 1976, in Book 417, page 548, presumably in the Deed Records of Moffat County, Colorado.

The Colorado State Office issued its decision rejecting the application on Apr. 11, 1979. The reason given for rejection was as follows:

> While it appears that Charles Mantle may have misdescribed, in his Application, the land he intended to enter and that the present amendment may properly describe his intention, the amendment cannot be approved. The land covered by the present application was withdrawn from entry by Power Site Reserve No. 721 as of June 27, 1919. This withdrawal was construed by Power Site Interpretation No. 120 on June 29, 1928. While the withdrawal was revoked on July 8, 1974, all the land in Sections 17 and 18 were withdrawn for Dinosaur National Monument by the Act of September 8, 1960. Therefore, the land applied for in the subject application cannot be patented to the applicant, because it is neither presently available for entry nor was it available for entry in 1932 when the original patent was issued. *Frank H. and Claire E. Steffire*, 3 IBLA 255 (1971).

This appeal followed.

[1] We cannot agree with the finding in the Solicitor's memo that there was no error in the description of the land entered by Charles Mantle, and that he was simply trespassing when he built his new home and made other extensive improvements in the subdivision adjoining that of his previous home place. Such a finding is directly contrary to that made by everyone else who has been concerned with the case, including the BLM realty specialist who examined the land, the Superintendent of the Dinosaur National Monument, the Rocky Mountain Regional Director, NPS, BLM's Colorado State Director, and BLM's Associate Director, all of whom have opined in writing that there was an error, and that Charles Mantle occupied the lands applied for in good faith. The finding of the Solicitor is based on two facts which are recited in Doyle's report of his 1930 examination of the entry and the accompanying affidavit by Charles Mantle. Doyle's report noted that on the east and south sides of the SE¼NE¼ sec. 18 (where most of Mantle's improvements were then sited) there was a half-mile of three wire fence "across the canyons and between the bluffs." In Mantle's affidavit, dated Sept. 18, 1930, he stated, "That I this day pointed out the ¼ corner between Sections 17 and 18 in this township and range, and the improvements of every kind that I have placed on the lands embraced in this application." Concededly, these two statements, taken together might lead one to conclude, as the Solicitor did, that Charles Mantle knew where the section line was and had fenced it as his boundary. However, other evidence persuades us to the contrary.

The ranch was (and remains) isolated in extremely rugged terrain. There was no road for 12 miles, and access was by foot or horseback. The land was impassible to a wagon. The nearest neighbor was many miles away. Why, then, would Charles Mantle expend the money and extraordinary labor to bring in miles of fence wire on pack horses, cut and set posts in rocky ground, and string fence on two sides of the subdivision where his home, outbuild-

ings, garden, orchard, and much of his cultivation was? (The Doyle report notes that the garden, sweet clover cultivation and alfalfa were also enclosed in three-wire fence.) It surely was not done to keep people out or to delineate his boundaries, as there were no people to be excluded or to take notice of his property lines. Besides, he made no effort to fence any of his other boundaries. His affidavit states he was running 200 to 300 head of cattle then, and the Doyle report states, "The locality in which this homestead is located is ideal for wintering stock, owing to the shelter found on the side hills which slope to the river." It seems apparent that Charles Mantle's motive in fencing the south and east sides of the SE¼ NE¼ was to keep cattle away from his home and other improvements.

The fact that he knew where the section line between secs. 17 and 18 was does not compel the conclusion that he did not intend to include any sec. 17 land in his homestead. He had paid a surveyor to describe his land and to "*make out the papers for the original homestead.*" Having entrusted this task to someone he believed to be a professional, it is easy to believe that Mantle blithely assumed that it had been correctly done and never undertook to analyze it himself. Perhaps there was some failure of communication between Mantle and his surveyor as to the land to be included in the description, or perhaps the surveyor was simply incompetent.

Regardless of how the error was made, however, the most compelling reason for believing that it actually occurred is the land itself. One look at Fox's photograph "B" [3] ought to be sufficient to convince anyone that Charles Mantle could have had no reason to want, or any conceivable use for, the barren, inaccessible, insurmountable sandstone cliffs on the opposite side of the river. The topographic map shows the 5,800-foot contour line near the center of the E½NW¼, and the benchmark across the river in the patented S½NE¼ shows an elevation of 5,154 feet—a difference of 646 feet—which the photograph shows is achieved in a succession of vertical or near-vertical rises. Also, it will be recalled that Charles Mantle had been farming, ranching, and making his home on these lands for 10 years before filing his homestead application, and he had to be intimately familiar with the terrain and its uses. In May 1919, when he first settled there, all the land had the same status, and it was all equally available to him. To believe that he would deliberately have chosen 80 acres of barren, precipitous cliffs across the river in preference to the two 40-acre subdivisions of useful, relatively flat land immediately adjacent to his home place is to impugn his sanity. Mantle devoted most of his life and near-Herculean effort to the successful establishment of this wilderness

[3] The caption on Exhibit B is mislabelled "W½NW¼, Section 18," rather than "E½ NW¼," which reference to the topographic map and the text of the report show it to be.

homestead. He spent 2 years in building his "new" house on the land in sec. 17, which was his residence for the next 30 years and remains today the residence of his son's family. In his application for amendment of the patent, Charles Mantle simply stated, "The land I thought I was locating, I have cultivated and built my home upon, is in the valley along the river side. Of course I would not have made the expenditures I have unless I thought I owned the land." We regard this statement as entirely worthy of belief. His sincere, earnest determination in the founding and maintenance of this homestead belies any suggestion that he would have jeopardized the entire project by investing all this time, money, and labor on land which he knew he did not own, when he could just as easily have built his home on the adjacent patented 80 acres where the original improvements were sited.

We conclude that there was in fact an error made in the description of the land which Charles Mantle occupied and settled on May 1, 1919.

Having established the fact that an error did occur, we turn now to the question of whether this Department is possessed of the authority to afford the relief applied for.

The land was included in a powersite withdrawal on Aug. 2, 1919, subject to valid existing rights. Had Mantle's settlement postdated this withdrawal, it would not have precluded allowance of his homestead entry. When he made is homestead application in 1929, the Commissioner of the General Land Office, on Aug. 2, 1929, wrote to the Chief of the Field Division, noting that the application "appears to be allowable" and directing:

> You will cause investigation to be made and ascertain whether or not the applicant's alleged settlement was made prior to August 2, 1919, the date of the power site withdrawal withdrawing the lands in question and whether or not said settlement claim has been maintained until the present time, and make appropriate report.

The purpose of this directive was not to establish whether or not the homestead would be allowed but, rather, whether it would be allowed subject to sec. 24 of the Act of June 10, 1920. Doyle's report of his investigation confirmed that Mantle had indeed settled the land in May 1919 and subsequently maintained his settlement. On this basis the Assistant Commissioner wrote to the Register of the Denver Land Office on Apr. 29, 1931, saying:

> The applicant's settlement on and improvement of the land is shown by the record to have commenced in May 1919, prior to the Power Site Withdrawal and the entry will, therefore, be allowed without reservation under section 24 of the Federal Water Power Act.

The reason for fixing Mantle's rights as of the date of his actual settlement of the land rather than as of the date of the allowance of the entry (as the more modern rule provides) is expressed at 48 L.D. 389, 397 (1922), where the Department notes, an entryman "may have credit for residence as well as cul-

tivation before the date of entry if the land was, during the period in question, subject to appropriation by him."

Therefore, if the land with which we are here concerned was actually settled and claimed by Mantle from May 1, 1919, forward, and was merely misdescribed in his subsequent homestead application, neither the powersite withdrawal nor the later withdrawal for the expansion of Dinosaur National Monument would have interdicted his right to the land.

Moreover, even assuming that the successive withdrawals did attach to these lands, we cannot agree that the Secretary is barred from conveying them to appellant.

Charles Mantle originally filed his application for the amendment of his patent pursuant to 43 U.S.C. § 697 (1970). However, that Act was repealed in 1976 and supplanted by legislation which invested the Secretary with broader authority. Sec. 316 of Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1746 (1976). The present application by Mantle Ranch Corp. is being considered pursuant to the 1976 statute. The distinction between the two statutes was analyzed in *Roland Oswald*, 35 IBLA 79, 86 (1978), where we held:

> Section 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 *et seq.* * * * permits the Secretary to correct errors in any documents of conveyance which have been issued by the Federal Government to dispose of public lands. The provision replaces several repealed acts dealing with mistakes. In particular, former 43 U.S.C. § 697 (1964) allowed the Secretary to amend a patent where entry had erroneously been filed for a tract of land not intended to be entered. *The repealed section expressly limited its operation to lands upon which entry could have been made.* Thus, under the old law, no amendment would be possible in the present case because the lands intended to be entered had been withdrawn for a Forest Reserve. *H. L. Bigler*, 11 IBLA 297 (1973); *Frank H. Steffire*, 3 IBLA 255, 257 (1971); *Henry C. Cleek*, A-29257 (March 12, 1963).
>
> *No such limitation appears in the present section*, which reads:
>
> "Sec. 316. The Secretary may correct patents or documents of conveyance issued pursuant to section 208 of this Act or to other Acts relating to the disposal of public lands where necessary in order to eliminate errors. In addition, the Secretary may make corrections of errors in any documents of conveyance which have heretofore been issued by the Federal Government to dispose of public lands."
>
> [Italics added.]

Thus, even if Mantle's rights were subject to the effect of the withdrawals, the Secretary could grant relief at his discretion.[4] Of course, this would properly take into account the desires of the agency administering the withdrawn land. However, in this instance, the National Park Service wholeheartedly supports the conveyance.

[4] The case of *Frank H. Steffire*, 3 IBLA 255 (1971), cited by the Regional Solicitor in support of his opinion that withdrawn land cannot be conveyed to an applicant for patent reform, is inapposit. That case construed the effect of 43 U.S.C. § 697 (1970), since repealed. The case has nothing whatever to do with the power of the Secretary under sec. 316 of FLPMA.

Recently, in *George Val Snow*, 46 IBLA 101, 104 (1980), we observed:

> The statute, *supra*, provides that the Secretary *may* correct patents, thereby investing him (and those who are delegated to act for him) with discretion in the matter. Before such discretion can be exercised it must clearly appear that an error was, in fact, made. Otherwise, an application to amend would be barred as a matter of law. Once the fact of error in the patent is established, the other circumstances of the case must be examined to determine whether considerations of equity and justice warrant amendment of the patent.

Clearly, in this case considerations of equity and justice require that relief be afforded by granting the application. Not only has the land been occupied and claimed since 1919, the tract in sec. 17 has actually been the site of the family home for more than 40 years and is the place where Tim Mantle, the present occupant, was born. The heirs of Charles Mantle are entitled to what their father and husband actually earned by his compliance with the homestead law. *Cf. George Val Snow*, *supra*. No undue prejudice to the public interest will result. Moreover, the written acceptance by BLM of the deed of the E½ NW¼ of sec. 18 from appellant to the United States, and the subsequent recordation of that deed at BLM's direction, in contemplation that the patent would be amended, have significant implications in equity.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Colorado State Office, Bureau of Land Management, is reversed and the case is remanded with instructions to amend the patent in accordance with the application.

EDWARD W. STUEBING
Administrative Judge

WE CONCUR:

DOUGLAS E. HENRIQUES
Administrative Judge

JOSEPH W. GOSS
Administrative Judge

APPEAL OF J. T. GREGORY & SON, INC.

IBCA-1260-4-79

Decided *April 30, 1980*

Contract No. 14-16-0004-457, Fish and Widlife Service.

Sustained in Part.

1. Contracts: Construction and Operation: Subcontractors and Suppliers—Contracts: Disputes and Remedies: Damages: Liquidated Damages

Where a contractor claims excusable delays by reason of the failure of suppliers to timely supply material or to replace damaged or nonspecification material, the failure to show that the suppliers' delays were without the fault or negligence of both the contractor and the suppliers precludes a finding that the delays were excusable under the contract.

2. Contracts: Disputes and Remedies: Burden of Proof—Contracts: Disputes

and Remedies: Damages: Liquidated Damages—Contracts: Performance or Default: Excusable Delays

Where a contractor seeks relief from the assessment of liquidated damages for delayed completion of the contract work due to alleged excessive rain, the claim is denied for want of proof for failure to show that the amount of rain constituted unusually severe weather.

APPEARANCES: Mr. J. T. Gregory, Sr., President, J. T. Gregory & Son, Inc., Jackson, Georgia, for Appellant; Mr. Donald M. Spillman, Department Counsel, Atlanta, Georgia, for the Government.

OPINION BY ADMINISTRATIVE JUDGE LYNCH

INTERIOR BOARD OF CONTRACT APPEALS

In this appeal, the contractor seeks relief from the assessment of liquidated damages in the amount of $16,650, and requests payment of three claims for extra work alleged to have been required by the regional engineer. The appeal is submitted on the record. The Government's answer dated June 4, 1979, concedes that the three extra work claims totaling $808.09 were inadvertently denied by the contracting officer in his findings of fact, and advises that these claims would be allowed upon remand by the Board. This dispute has been the subject of discussion between the parties since the work was accepted as being substantially complete on Jan. 26, 1976, without significant agreement on the 222 days of liquidated damages assessed against the contractor at $75 per day. The contracting officer's final decision dated Nov. 28, 1978, included detailed findings on the contractor's claim for relief from liquidated damages and included a remittance for 9 days of liquidated damages in the amount of $675.

The contracting officer may reconsider his decision at any time before a final decision by the Board (or prior to a decision on a motion for reconsideration, if timely filed). The record shows that the parties have continued to correspond and to discuss the question of excusability of all or a portion of the delinquent performance time after the contract completion date, without modification of the contracting officer's decision. Therefore, we see no basis for remanding the appeal for reconsideration by the contracting officer where his final decision included the claim before us. We treat the statement in the Government answer as a concession of liability, however, and allow the three extra work claim items in the amount of $808.09.

Apart from the contractor's claim that the delinquent performance time was excusable by reason of adverse weather conditions and the inability to timely secure material from his suppliers, the record discloses no disagreement on the basic facts in the case. Consequently, much of the pertinent information concerning the background of this

dispute is taken from the contracting officer's findings of fact.

Background

Contract No. 14–16–0004–457 was awarded to J. T. Gregory & Son, Inc., on July 22, 1974. The contract was prepared on Standard Form 23–A (October 1969 edition) and contained the usual Clause 5, "Termination for Default–Damages for Delay–Time Extensions" with the relevant paragraph (d) as follows:

(d) The Contractor's right to proceed shall not be so terminated nor the Contractor charged with resulting damage if:

(1) The delay in the completion of the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to, acts of God, acts of the public enemy, acts of the Government in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, or delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and such subcontractors or suppliers; and

(2) The Contractor, within 10 days from the beginning of any such delay (unless the Contracting Officer grants a further period of time before the date of final payment under the contract), notifies the Contracting Officer in writing of the causes of delay.

The Contracting Officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when, in his judgment, the findings of fact justify such an extension and his findings of fact shall be final and conclusive on the parties, subject only to appeal as provided in Clause 6 of these General Provisions.

The work consisted of clearing, grubbing, stripping, grading, filling, and shaping of construction areas; removal and disposal of in-place items; construction of a comfort station, sewage collection, treatment, and disposal system, including sewage collection lines, sewer manholes, sewage treatment-filtration-chlorination system, effluent outfall line, reinforced concrete headwall, and various allied items of work at the Piedmont National Wildlife Refuge, Round Oak, Georgia. One change order was issued on June 17, 1975, which changed the wood siding material on the comfort station building from southern pine to cedar. This change order increased the amount of the contract by $1,141 and added 10 calendar days in performance time. One extra work order was issued on Sept. 4, 1975, for the furnishing and installing of an electric water heater in the utility room of the comfort station for an amount of $750 and an increase of 20 calendar days in performance time. The contract allowed for a total of 270 calendar days for completion of the work, including the additional time provided for by the contract modifications. The contract provided for a rate of liquidated damages for failure to complete the work within the time specified in the amount of $75 per day for each calendar day of delay.

The contract stipulated that the notice to proceed with the work

would not be issued until 60 calendar days after award of the contract. Accordingly, the notice to proceed was issued Sept. 20, 1974, and was acknowledged as received by the contractor on Sept. 21, 1974. The completion date for the contract was June 18, 1975. However, the work under the contract was not accepted by the Government as being substantially complete until Jan. 26, 1976, resulting in 222 days of liquidated damages levied against the contractor.

In his letter of June 7, 1975, the contractor requested a time extension of 151 days, of which he claimed 109 days of adverse weather conditions which either prevented work at the job site or affected performance to such an extent that very little was accomplished and 42 Saturdays, Sundays, and holidays which were not affected by adverse weather.

In his letter of July 3, 1975, contractor stated that electrical equipment specified was ordered in October 1974 and had not yet been delivered as well as numerous items contained in sec. 16 of the specifications. Contractor further stated that completion of the project was contingent upon receipt of those materials.

By letter dated Nov. 3, 1975, contractor advised once again of delivery problems with the electrical equipment and cited same difficulty in acquiring partitions and accessories for the comfort rooms and shower rooms at the comfort station.

The contractor, in his letter of Feb. 28, 1976, stated that:

> There have been many delays encountered during the construction of the project which we feel warrants an extension of time in accordance with the provisions of the contract (Information to substantiate our claim for time extension is being collected and assembled and will be presented as quickly as possible).

The contractor has asked to be relieved of all liquidated damages. It would appear that relief is sought for adverse weather conditions experienced during the execution of the project and for days other than what is considered the normal "work week," as expressed in contractor's letter of June 7, 1975, and late material delivery problems expressed in letters dated July 3 and Nov. 3, 1975.

By contracting officer's letter of June 17, 1975, contractor was advised that the performance time as established in the contract was *calendar* days and that Saturdays, Sundays, and holidays must be included in the calculation of performance time. Further, he was advised that a findings of fact and decision of the contracting officer would be written when time permitted as to the adverse weather conditions affecting the work.

In that same letter, the contractor was also told that the Government was not satisfied with the progress of the work at the site. Very little work had been done since the progress report made following the period, ending Feb. 15, 1975; and although the weather may have affected ground conditions on a num-

ber of days, more than $4,000 worth of work should have been completed since February 15. Contractor was requested to furnish an estimate as to when all work required under the contract would be completed.

The contractor advised in his letter of July 3, 1975, that he expected to complete all work on or about Aug. 1, 1975, contingent upon receipt of required materials within a few days.

As to material supplier delivery delays expressed in contractor's letters of July 3 and Nov. 3, 1975, the contractor was advised by the contracting officer's letter of Oct. 23, 1975, and again by letter dated Nov. 11, 1975, that documentation would have to be furnished establishing the existence of such delays.

In a letter dated Feb. 11, 1976, contractor was notified that the Government was accepting the contract as substantially complete as of Jan. 26, 1976. A list of eight items remained unfinished. The contractor, however, was permitted to complete these items under the 1-year warranty period since certain items had to come from various manufacturers.

The Contracting Officer's Findings

(1) *Contractor's Request for Relief from Liquidated Damages Based on Adverse Weather Delays.*

Based on information provided with his letter of June 7, 1975, in which the contractor requested time extension of 151 days (109 of which he claimed adverse weather conditions prevented or affected work performance at the site and 42 Saturdays, Sundays, and holidays which were not affected), the contracting officer finds:

(a) From information obtained from the climatological data published by the Department of Commerce and from the Government Inspector's daily logs, the following facts were established:

(i) During the months of September (day 22 thru day 30), October, and November 1974 only a few days of work performance were affected by adverse weather conditions.

(ii) During the month of December 1974 a total of 7.26 inches of precipitation was indicated for the area of the project, a departure of 1.53 inches from the normal. Rain was scattered during the month and there was no unusual concentration that would have affected work performance. Contractor worked 8 days out of the 31 days in the month.

(iii) During the month of January 1975 a total of 6.96 inches of precipitation was indicated, a departure of 1.14 inches from the normal. Rain was scattered during the month and there was no unusual concentration that would have affected work performance. Contractor worked 3 days out of 31 in the month.

(iv) During the month of February 1975 a total of 9.95 inches of precipitation was indicated, a departure of 3.77 inches from the normal. There was a period between February 16 and 24 in which the contractor did not work and rain

was concentrated so as to probably affect work performance. The contractor worked 11 days out of 28 days in the month.

(v) During the month of March 1975 a total of 10.47 inches of precipitation was indicated, a departure of 3.27 inches from the normal. Rain was scattered during the month and there was no unusual concentration that would have affected work performance. Contractor worked 19 days out of the 31 days in the month.

(vi) During the month of April 1975 a total of 1.92 inches of precipitation was indicated, a departure of minus (–) 3.49 inches from the normal. Rain was scattered during the month and there was no unusual concentration that would have affected work performance. Contractor worked 15 days out of 30 in the month.

(vii) During the month of May 1975 a total of 6.91 inches of precipitation was indicated, a departure of 2.70 inches from the normal. Rain was scattered during the month and there was no unusual concentration that would have affected work performance. Contractor worked 17 days out of the 31 days in the month.

Based on information given in subparagraphs (i) through (vii), the days of adverse weather that the contractor claims in the months of September, October, November, December, January, March, April, and May are not considered as "unusually severe weather" needed to establish an excusable delay as defined in Clause 5(d) of Standard Form 23–A, General Provisions (Construction Contract), which was made a part of subject contract. Such weather conditions which existed during those months are considered a part of the general hazard assumed by the contractor in connection with performance of the contract. During the month of February 1975 the period of 9 days (February 16 through February 24) where no work was performed by the contractor and where there existed concentrated rain is considered to be "unusual." Contractor will be permitted a 9-day remittance of liquidated damages in the amount of $675.

(b) Contractor is not entitled to 42 Saturdays, Sundays, and holidays on which there was no rain. These days must be included in the calculation of performance time since time completion in the contract was expressed in calendar days.

(2) *Contractor's Request for Release from Liquidated Damages Based on Material Supply Delays.*

Contractor's request is denied since the contractor has failed to present evidence establishing existence of excusable delays as defined in Clause 5(d) of Standard Form 23–A, General Provisions (Construction Contract), which was made a part of subject contract.

Discussion and Findings

The above findings of the contracting officer resulted in the following allowances:

Payment of amount withheld by the Government	$800
Payment for one extra work item	60
Remission of 9 days of liquidated damages	675
	1,535

In support of his claim for excusable delays due to the failure of material suppliers to make timely deliveries, appellant offers many letters from suppliers reciting the difficulties encountered in making shipments on time or relating to the replacement of materials damaged during the initial shipment or of items shipped which did not comply with specifications. The reasons given were:

1. One supplier advised of a heart attack and hospitalization of one of its personnel and later fabrication problems with one of its suppliers.

2. Repeated promises of scheduled deliveries by one supplier were not met with the result that material promised in December 1974 was not received until July 1975.

3. A drinking fountain delivered late initially was found to be cracked and was not replaced until 4 months later.

4. Specified decorative roof grills could not be obtained and after a specification deviation was granted, substitute grills were obtained.

5. Excessive breakage of block during shipment was not determinable until time for use so that replacement orders were delayed.

6. The installation of nonspecification roof rafters were required to be replaced by the Government inspectors, resulting in delay in securing replacement rafters of the correct size.

7. A filter unit was found to malfunction after installation and testing and delay was encountered in securing a replacement unit.

8. Materials stored on the site were found to have missing items and required added time to secure replacements.

Appellant has the responsibility for managing his subcontractors and suppliers to assure that they perform in accordance with the contract agreements with appellant. The excusable delays for which appellant may not be held responsible respecting his suppliers are "delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and *without the fault or negligence of both the Contractor and such subcontractors or suppliers.*" (Italics added.) The unforeseeable causes that would excuse appellant for delays in performance are such acts as are listed in Clause 5, *e.g.*, acts of God, acts of the public enemy, fires, floods, epidemics, strikes, etc. None of the reasons given by appellant for delays in performance by his suppliers can be seen to be caused by such causes that would be without the fault or negligence of either. Failures of suppliers to ship materials when promised, or the shipment of damaged or nonspecification material are within the control of the sup-

plier to avoid, and therefore, are not without the fault of the suppliers.

[1] Appellant has not provided evidence that any of the suppliers failed to timely deliver materials due to a cause beyond the supplier's control. Therefore, we find that the delays alleged to be caused by failures of suppliers to timely deliver are not excusable delays within the meaning of Clause 5 of the contract.

In regard to delays alleged to be due to unusually severe weather, appellant relies on the U.S. Department of Commerce climatological data for June, July, and August 1975, and the rainfall data computed from the same source and included in the contracting officer's findings of fact. In addition, appellant's letter dated June 7, 1975, contains a tabulation of weather conditions as reflected on daily reports of the project inspector, and purports to show 109 workdays and 30 weekend days or holidays affected by adverse weather conditions. Essentially, appellant claims that any day listed with an entry of "rain," "wet," "muddy," "damp," or "damp, soft ground" should be considered as a day of excusable delay because of unusually severe weather within the meaning of Clause 5. The fact that there were days during the contract performance period on which it rained, and subsequent days when the ground was wet or muddy cannot be considered an unusual phenomena, but rather a normal pattern of weather conditions. Under a construction contract, the contractor is not assured that all the workdays will be fair and ideal for the orderly progression of the work. Of 270 calendar days allotted for contract performance, the contractor had to expect a reasonable number of inclement days and plan for them in agreeing to the contract schedule.

A review of the project inspector's tabulation prepared and furnished by appellant shows 1 rain workday in September 1974; 1 day in October; 4 rain and 1 wet day in November; 14 days of rain, wet, muddy or damp in December; 11 similar days in January 1975; 18 days in February; 11 in March; 13 in April; and 7 in May. Absent a more detailed analysis than exists in the record, this pattern of days of rain or the aftereffects of rain appears to be similar to that existing in many parts of the eastern United States. Even should it appear that the amount of rain during the contract performance period exceeded the normal rainfall in the area of the work, appellant has not shown that rain actually interfered with the work under the contract. The record does not show that an excessive amount of rain occurred during the course of outside construction, or when the comfort station was under roof so that the effects of rain may have had less impact on the progress of the work, or any specific evidence that the alleged rain adversely affected the work. (*See McBride and Wachtell*, par. 39.90.)

[2] Appellant's failure to show that the amount of rain was sufficient to constitute unusually severe weather compels our finding that the claim for relief from assessment of liquidated damages must fail for want of proof.

Conclusion

The amounts previously determined to be allowable shall be paid to the appellant, if not previously paid, as follows:

Three extra work claims in complaint dated Feb. 7, 1979, conceded by Government in Answer	$808.09
Amount withheld by Government until correction of all items	800.00
Nine (9) days of remitted liquidated damages allowed in contracting officer's letter of Nov. 28, 1978	675.00
Extra work claim for water closet wall bearing plates allowed in contracting officer's final decision	60.00
Total allowed	2,343.09

The appeal for relief from liquidated damages due to material supplier difficulties and adverse weather conditions is denied.

RUSSELL C. LYNCH
Administrative Judge

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

U.S. GOVERNMENT PRINTING OFFICE : 1980 O - 319-957